No. 12437

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES ANTHONY ALLEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

Upon Appeal from the United States District Court
Eastern District of Washington
Northern Division

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WILLIAM E. CULLEN,
726 Paulsen Building,
Spokane, Washington.

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Appellant respectfully prays that this cause be reheard and reconsidered, and prays for a reconsideration of the opinion filed herein January 4, 1951, by reason of all the records and files herein and because of the following points in which the appellant believes that the Court fell into substantial and serious error on the legal and factual issues involved and presented by the appeal in this cause:

I.

Consideration of the whole record discloses that appellant Allen's association with Keane was not conspiratorial as charged in the indictment but that, in fact, it was an unavoidable incident of the appellant's

legitimate position and pursuits in the development of the Mullan mining area.

The opinion of the Court holds that there was much evidence *apart* from the testimony of Keane and Grismer, *tending to prove* that Allen actively participated in the alleged fraudulent enterprises. We respectfully desire to review certain portions of the record in that regard. Our purpose in this review will be to avoid repetition but to point out to the Court that the tendency of the evidence taken as a whole supports the appellant's contention that his conviction has not resulted from active association and active participation in illegal and fraudulent schemes. It is the position of the appellant that a mere association or affiliation is insufficient to mark appellant as a conspirator and that the evidence must prove beyond reasonable doubt that appellant adhered to and knowingly furthered an illegal conspiracy.

It is the position of the appellant, aside from any argument of inconsistency in a verdict, that his acquittal on the six substantive offenses charged left nothing for the jury to pass upon. We respectfully repeat that the question does not concern inconsistency alone, but relates to a situation where the same acts and proof requiring the same intent and unity of operation were held insufficient to convict appellant on six counts but sufficient to convict appellant of a count of crime, the proof of which must have necessarily

been assumed solely from association. The jury was convinced that no personal guilt of substantive offense attached to Allen and the conviction on the conspiracy count, in our opinion, violates the fundamental principle that guilt is personal and does not arise from the actions of others. (See *Bridges v. Wixon*, 326 U. S. 135.)

Before reviewing what we deem to be pertinent portions of the record we repeat again that the testimony of Keane, Grismer and Vermillion is not entitled to credence in view of the close and important decision that must be made and which will effect appellant Allen's future career. In view of Allen's acquittal of six counts in the indictment by the jury, it seems that any testimony by Keane, Grismer or Vermillion serves to attempt to deprecate that judgment, and should thus be entitled to very little weight in this Court.

First, as to Grismer—we respectfully direct the Court's attention to the appellant's opening brief at page 108. There is found a statement made by Grismer at a stockholders' meeting of Pilot on August 7, 1948, which is completely and entirely at variance with any theory of conspiracy at all. The statement, if this Court please, is much more important in this case in view of the fact that it was made by Grismer several months after an indictment had been returned against him, and at a time when he surely must have known the possible consequences of the statement which he made.

Second, as to Vermillion—it is noticeable in her testimony (Tr. p. 148 et. seq.), that she dutifully and zealously answered questions with an undeniable stock answer; queries directed at her implying participation in crime as they related to the defendants, were always answered "Mr. Keane and Mr. Allen." Nevertheless, the motive and interest of the witness certainly appears in her activities concerning the filing of a false statement with the State of Washington (Tr. pp. 243-248, incl.). If there is any doubt of motive and interest on the part of Vermillion after the evasive answers given by Vermillion, then it appears in other parts of the record where the association of most of the important government witnesses in mutual interests hostile to Allen, appears. The individuals in Wallace, Idaho, involved in these transactions were bound in a close-knit organization. Witness Vermillion was Keane's secretary and likewise the court reporter for Judge Featherstone who was, in turn, a fellow director of mining enterprises with witness Horning and witness and defendant Keane (Tr. pp. 673, 674; 717 et. seq. & etc.). Furthermore, although we desire to avoid repetition in this petition, we believe it is most urgent for this Court to consider whether or not a conspiracy existed during this trial between the various cronies from Wallace, Idaho, who profited from many of the transactions in which Allen is accused of being the moving party. The testimony of witness Emacio indicates, as well as Keane's testimony heretofore referred to, that

certain individuals in Wallace, Idaho, profited greatly, and this in contrast to the undeniable fact that Allen profited not at all on any of these transactions.

Now we come to Keane—very little will be said about Keane because this Court is familiar with his activities and depredations which are indicated in the record of this case and in other matters which have been before this Court. We submit that the truth is a stranger to Mr. Keane.

II.

Now, turning to the Court's consideration of the evidence, which the Court has held, apart from Keane, Grismer and Vermillion, to be sufficient, as tending to show Allen's illegal participation. There appears the conversations with Elmer Johnston, a Spokane attorney, and the Court imparts considerable importance to this circumstance. We would like to direct the Court's attention to what appears to us to be the reasonable picture and explanation of appellant Allen's association with Johnston. Mr. Johnston's recollection was that in the spring or summer of 1945 Allen discussed his project of deep development and his testimony indicates that such a development was Allen's only interest in that area (Tr. pp. 581-583, inc.). It further appears that interests represented by Mr. Johnston paid Allen a considerable block of stock for his work in negotiating with several companies involved in the deep development project and his testi-

mony indicates that Mr. Allen thrashed out the repeated rows and fights (Tr. pp. 588, 589). The stock payment indicates Allen performed valuable services. In our opinion, the matter of the injunction was not a furtive thing in any negotiations Mr. Allen had with Mr. Johnston (Tr. pp. 591-594, incl.). Likewise it appears that Johnston's opinion, and this was certainly his opinion after the conversations which he said he had with Allen, was that he was convinced that Keane was dominating and controlling the promotion of the companies involved in this cause (Tr. pp. 596-598, incl.), and it likewise appears that Mr. Randall, the accountant, was not acquainted with any purported activities of Allen by way of promotion (Tr. p. 598). Likewise, it should be pointed out that although Allen has been charged with secretly assisting and aiding in the promotion of Pilot Silver Lead, it appears from the record that the civil injunction against Allen would have expired only twelve days after the first issue of Pilot. It seems reasonable to suggest that Allen, if he exercised any control, direction or participation in Pilot, could have easily waited twelve days until the injunction expired and then commenced to promote Pilot profitably without being under any legal prohibition of any kind (Tr. pp. 1102-1103, incl.).

There can be no doubt at all that Keane made huge diversions from Pilot and Lucky Friday, and records of which this Court will take judicial notice indicate that these were not the first diversions Mr. Keane had

ever made from companies of which he was an officer. His activities in Independence years before indicated the source of his capital for joint ventures upon which he embarked. It is with very little wonder that we note the trial Court's reference to Mr. Keane as "the evil Mr. Keane" (Judge Black, Tr. p. 906); the statement that Keane was "confessedly evil" and the description of his activities as "those evil acts of Mr. Keane's." The defendant Keane was guilty to an absolute certainty (Tr. p. 1290) and his conversion was admitted (Tr. p. 663). The defendant Keane was certainly guilty of forgery (Defendant's Exhibit M, Plaintiff's Exhibit 95; Tr. pp. 1075, 1076; Plaintiff's Exhibit 105, Tr. p. 824; Tr. pp. 1076-1078, incl.; 1092). This description of Mr. Keane is not entirely complete but it is repeated in connection with our objective to determine, whether or not, there is a completely reasonable justification for appellant Allen's conviction on one count. It is in furtherance of our premise that including or aside from the testimony of Keane, Grismer and Vermillion, the facts indicated a situation as to Allen, which is consistent with his innocence, not his guilt.

Allen was interested in the Montana property and that fact is not denied. The facts indicate that Allen and Keane put money into Montana Leasing, and it would seem that if Allen was engaged in a conspiracy with Keane he would have allowed the companies which Keane organized and controlled to finance the entire

undertaking rather than expend funds of his own. The fact that Allen made withdrawals from Montana Leasing in no way tends to indicate complicity in crime, when it is noted that Allen put $80,000 more of his funds into the venture than he ever realized from any source, in stock, or otherwise (Tr. p. 1167). We have already shown that Allen's sales of stock were made at far below a price where he could have advantageously engaged in the conspiracy had he been an active participant in the bilking. Likewise, after Allen and Grismer threw Keane out of the companies in accordance with the recital of Grismer, heretofore set out in this argument, Allen personally advanced additional moneys to attempt to maintain the companies involved (Defendant's Exhibit BB; Plaintiff's Exhibit 18, Tr. pp. 1071-1074, incl.). Keane originally had advanced moneys out of Independence which Allen paid back (Tr. pp. 1123, 1124) and it seems most reasonable that in a joint venture of this kind Allen could assume that Keane had authority to advance moneys from Independence, and it is further reasonable to assume that in a situation where Allen had no control over the companies involved in this action, he could not be charged with knowing that Keane had changed his source of contribution (Tr. p. 1124), and nowhere is it suggested that Allen had any participation whatsoever in the $40,000 which came out of the Pilot and then went into Keane's account and thence out to vari-

ous attorneys interested in the Independence litigation (Tr. pp. 1121, 1122; 1147, 1148).

The foregoing then outlines what we believe to be the pertinent support for our position in this appeal as follows: (a) Allen contributed his own funds to his mining operations in Montana. (b) He had contributed his own funds to such an operation prior to the time of Keane's defalcations and had honored his obligations. (c) He had no part in the withdrawal of the large sum of $40,000 which would indicate Keane's own independent personal activity from the beginning and throughout the transactions. (d) His arrangement with Grismer for acquiring stock was in no wise irregular, for had Allen conspired in the beginning he would certainly have acquired the stock and engaged in private selling for personal profit.

In view of the above and foregoing we come to the matter of the checks issued by the Delaware Mines Corporation. The Court's opinion says that Allen's participation is circumstantially confirmed by Allen's presence in Wallace and Keane's absence on a fishing trip. Mrs. French had no independent recollection with respect to Allen's personal connection with the checks in question and in fact her testimony disputed Vermillion's in part (Tr. p. 167; Appellant's Reply Brief, pp. 9, 10). We cannot say, nor do we know of Keane's physical presence in or out of Wallace on the day in question. We do know that blank checks of Delaware,

signed by Allen and Keane, were kept by Vermillion (Tr. pp. 324-329, incl.), and we do know that Keane had proved his adeptness at forging Allen's name. In view of all the above and foregoing, it is a reasonable hypothesis to assume Keane's connection with the disputed account and checks.

The Court's opinion concluded that appellant Allen did not give a reasonable explanation, nor did he deny the circumstantial facts attempted to be shown by the Government in the above transaction. We should like to point out, however, that in view of Keane's forging activities, the situation created was a situation which could not be met by certain denial. We offer no lame excuses in making such a statement for the very important reason, that had it not been for a fortuitous circumstance in the identification of Keane's writing of the words "J. A. Allen," Allen would likewise have been charged with negotiating the sale of stock to J. A. Hogle & Company in Butte and receiving funds therefor. The Government called the witness F. C. Greene, who was manager of a stock brokerage office in Butte, and who testified as follows on direct examination:

Q. Do you know Mr. James A. Allen?

A. Yes, sir.

Q. Is this the Mr. James A. Allen—

A. Yes, sir.

Q. —with which you had the transaction? Now,

Mr. Greene, what was the nature of that transaction?

A. I don't remember any details.

* * * *

Q. Mr. Greene, I'll hand you Plaintiff's identification 104 (858) and ask you to state what those are?

A. Those are confirmation of sales mailed to customers from our main office in Salt Lake.

Q. And what do those confirmations represent?

A. They show sales of 35,000 Lucky Friday Extension.

Q. For whom?

A. For Mr. J. A. Allen.

Q. And what date?

A. On November 29.

Q. Of what year?

A. 1945.

Q. Now, Mr. Greene, I will hand you Plaintiff's identification 105, and ask you to state what that is?

A. That's a check made payable to Mr. Allen for $6,872.95 signed by me, and mailed to Mr. Allen from our Butte office.

Q. And bearing what date?

A. Bearing date of December 3, 1945.

Q. Does identification 105 have any relation to identification 104, and if so, what?

A. It covers the sale of 35,000 Lucky Friday Extension on November 29.

THE COURT: How many thousand?

A. Thirty-five thousand.

MR. ERICKSON: I will offer 104 and 105 in evidence (859).

MR. ETTER: A few questions on *voir dire.*

On *voir dire* examination, Mr. Greene testified as follows:

Q. Well, do you remember whether Mr. Allen personally participated in this transaction?

A. Not definitely. I think he delivered the certificates to me personally.

Q. Are you sure that he did?

A. I'm not sure. I think he did, though.

Q. Could this check that you have *you* mailed —isn't it a fact that you mailed that to Mr. Keane's office in Wallace?

A. That I don't remember. I think it should have been mailed to Mr. Allen, unless he gave Mr. Keane's address.

Q. Or you're not sure whether Mr. Keane gave Mr. Keane's address to you and sold the stock in Mr. Allen's name?

A. No, he didn't do that.

Q. But you sent this check someplace, you think to Mr. Allen?

A. Yes, sir.

MR. ETTER: That's all.

(Tr. pp. 815-818, incl.).

The appellant, in view of this testimony, was confronted with positive testimony that he had negotiated a sale, had received, endorsed and cashed a check and as a result had probably received the amount of money indicated by the check of $6,872.95 (Plaintiff's Exhibit 105). However, there was ample testimony and proof of Keane's forging Allen's name to the Hogle check, being Plaintiff's Exhibit 105, and to a $60,000 production note of Montana Leasing to Independence, being defendant's exhibit M (Tr. pp. 889, 894). It developed further without contradiction from Keane or otherwise that Allen had never negotiated a sale with Hogle and had not received a check signed by the company, or received the funds after cashing it (Tr. pp. 1066, 1077, 1078, 1091-1093, incl.). Had it not been for discussions which Mr. Allen had with Mr. Denny, as indicated in the record heretofore, he would have been unprepared for the explanation of his forged signature on the documents which were involved in this litigation, and which the prosecution, at least in the case of Plaintiff's Exhibit 105, believed to be genuine and of prime importance in the case against appellant Allen.

The foregoing is submitted to your Honors as illustrative of the same difficulty that appellant had in attempting to meet other allegations and circumstances which were made and which appellant was bound to

inquire into throughout the trial, in respect to validity and authenticity. We think it reasonable to suggest that in view of the skill exhibited by Mr. Keane in handwriting and otherwise, that a logical tendency of the testimony, so far as he and his cohorts were concerned, was toward the false and unlikely rather than the likely and the truth. This argument is not idly made, but is submitted in all sincerity and after a full consideration and clear recollection of the difficulty in attempting to get the truth from Mr. Keane during cross-examination.

The Court likewise in its opinion makes reference to claimed diversions into the War Eagle Silver Lead Mines, Inc. The Court indicated that this company was owned by defendants Keane and Allen and one Ben Porter. However, the evidence so far as Porter's testimony was concerned, did not in anywise support the conclusion. Porter testified that Keane had been his attorney and he further testified that Allen had nothing to do with his securing a loan and that neither Keane nor Allen had, prior to the trial, or at the time of trial, any interest whatsoever in the War Eagle property. (See Appellant's Reply Brief, p. 89.)

Furthermore, the matter of certain checks cashed by Allen is not sufficient warrant, in our opinion, to indicate criminal intent or secrecy. We have pointed out, and as the record speaks, Allen's contributions from personal funds left him the loser by $80,000. The

transactions referred to are not profits which accrued to Allen under any view of the evidence (Tr. pp. 1115, 1118, 1129, 1130, et. seq.).

The theory of the prosecution which was carried through this entire trial, and the theory upon which conspiratorial interest is sought to be imputed to Allen, arises from the primary thesis that Montana Leasing was in need of funds; that because of this need for funds the conspiracy found origin with the defendants. The proof of the Government was directed to that end throughout the case. This Court concludes that a sufficient basis existed in the facts and circumstances to justify appellant Allen's conviction. The primary premise, however, was not proved and we submit that the basis of the theory falls with the destruction of that primary premise. We respectfully direct the Court's attention on this important phase of the case to the following sections of the record: Tr. pp. 1066, 1067, 1078.

CONCLUSION

We do not desire to be repetitious or contentious with the Court in making reference to the record, but we respectfully implore the Court to give added consideration to the record so that the wheat may be separated from the chaff. Particularly do we request the Court to consider again the probability and reasonableness of Allen's contention, as opposed to the testimony and evidence which must necessarily find its base

and strongest support in the testimony of Keane, Grismer and Vermillion. We do not feel that the answer to the verdict is found in the opinion of the Supreme Court to the effect that inconsistency in a verdict is no legal ground for reversal. The pleading in the indictment and the character of the proof was such that the case against appellant Allen fell with his acquittal on the first six counts and there was no factual proof of guilt on Count 7, unless a departure is taken from the construction placed upon the facts by the jury in its acquittal.

Respectfully submitted,

R. Max Etter,

William E. Cullen,

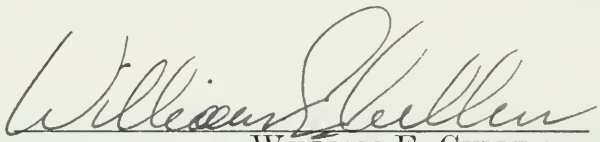
Therrett Towles,

of Counsel for Appellant.

CERTIFICATE

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Respectfully submitted,



WILLIAM E. CULLEN.